89-1088

No. ____________

DEC 15 1989

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ESTO, INC., UNITED PACIFIC
INSURANCE COMPANY and RELIANCE
INSURANCE COMPANY,

Petitioners,

vs.

C.E. CALLAHAN,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONALD B. DEVIRIAN, ESQ.
BROWN & BROWN PROFESSIONAL CORPORATION
10100 Santa Monica Boulevard
Suite 2080
Los Angeles, California 90067
(213) 552-1919

Attorney for Petitioners

52

QUESTIONS PRESENTED.

1. Whether the scope of all remedies provided under the Miller Act, 40 U.S.C. Section 270 et. seq., are matters of federal law.

2. Whether Rule 51 of the Federal Rules of Civil Procedure is satisfied when a party offers a proposed jury instruction and obtains a ruling thereon.

SUBJECT INDEX

Page

TABLE OF AUTHORITIES CITED

Cases

Rules

Statute

IN THE

Supreme Court of the United States

October Term, 1989

No.

H.A. EKELIN AND ASSOCIATES,
UNITED PACIFIC INSURANCE
COMPANY and RELIANCE INSURANCE COMPANY,

Petitioner,

vs.

C.E. CALLAHAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, H.A. EKELIN AND ASSOCIATES, UNITED PACIFIC INSURANCE COMPANY and RELIANCE INSURANCE COMPANY respectfully pray that a Writ of Certiorari issue to review the judgment

and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 6, 1989.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as 884 F.2d 1180. Pursuant to Rule 23(1)(i), this opinion is presented separately in Appendix A..

JURISDICTION.

1. The opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 6, 1989.

2. A timely petition for

rehearing was filed on September 19, 1989.

3. An order denying the petition for rehearing was filed on November 15, 1989.

4. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED.

1. Whether the scope of all remedies provided under the Miller Act, 40 U.S.C. Section 270 et. seq., are matters of federal law.

2. Whether Rule 51 of the Federal Rules of Civil Procedure is satisfied when a party offers a proposed jury instruction and obtains a ruling thereon.

STATUTORY PROVISION INVOLVED.

The statutes involved in this petition are 40 U.S.C. Section 270 et. seq. and Rule 51 of the Federal Rules of Civil Procedure (28 U.S.C. Rule 51). These statutes are reproduced in full in Appendix B.

STATEMENT OF THE CASE.

Facts.

The petitioner, ESTO, INC.,

formerly known as H.A. EKELIN AND ASSOCIATES, was a prime contractor with respect to a federal work of improvement at Fort Irwin, California. ESTO entered into a contract with the Department of the Army to construct four large buildings at the Army base, together with surrounding concrete aprons. (R.T. 614) The petitioners, UNITED PACIFIC INSURANCE COMPANY and RELIANCE INSURANCE COMPANY were ESTO's Miller Act sureties.

ESTO subcontracted the grading work to the respondent, C.E. CALLAHAN. CALLAHAN's work commenced on December 2, 1982, and, following a dispute between the parties, was terminated by ESTO for non-performance on December 2, 1989. (R.T. 178)

This action was originally filed by Dennie Reed, a subcontractor to

CALLAHAN. CALLAHAN, in turn, filed a cross-claim against H.A. EKELIN AND ASSOCIATES for breach of contract and recovery under the Miller Act, as well as for recovery under unrelated causes of action which were dismissed by the trial court. The Reed action was settled and dismissed prior to trial. The action proceeded to trial on the cross-claim of CALLAHAN. Jurisdiction of the trial court was based on 40 U.S.C. Section 270.

The action was tried before a jury. The judgment on the verdict awarded CALLAHAN damages in the sum of $196,779.00 against all of the petitioners and awarded the additional sum of $69,222.52 against the petitioner ESTO only. This latter amount represented an award for delay damages

which were not compensable under the Miller Act. (C.R. 108)

Following the judgment on the verdict, and by way of motion to the trial court, the court awarded attorneys' fees against the petitioner ESTO in the sum of $28,000.00. No attorneys' fees were awarded against the Miller Act sureties. (C.R. 124)

How the Federal Questions Sought to Be Reviewed Were Raised and Disposed of by the Courts Below.

1. Attorneys' Fees.

The respondent sought recovery of attorneys' fees in the sum of $112,455.00 against all petitioners in this proceeding by way of a motion to the trial court. The motion was heard

on May 5, 1986. At the hearing, the trial court ruled there was no basis for awarding attorneys' fees under the Miller Act claim. (8 R.T. 1254) The trial court stated:

> "Under the Rich case [F.D. Rich Co., Inc. v. United States, 417 U.S. 116 [40 L.Ed.2d 703 (1974)]] attorneys' fees are not recoverable in a Miller Act claim because it is governed by federal common law unless, one, there is a vexatiousness or bad faith; or two, as provided for in the contract."

(8 R.T. 1253).

The respondent appealed the denial of the motion for attorneys' fees to the United States Court of Appeals for the Ninth Circuit. There the court reversed

the trial court concluding that there was a contractual provision for an award of attorneys' fees under California Civil Code Section 1717.

2. Jury Instructions.

During the course of the trial, the petitioners offered four proposed jury instructions which the trial court refused to give. (See, Supplemental Excerpts, C.R. 98 and 102, R.T. 1078 and 1089) A cross-appeal was filed by the petitioners based, in part, on the refusal of the trial court to give the requested instructions. The Court of Appeals, however, refused to consider the argument based on Federal Rule of Civil Procedure, Rule 51, and ruled that ESTO failed to preserve the issue of the

rejected jury instructions.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

THE DECISION OF THE COURT OF APPEALS REGARDING THE AWARDING OF ATTORNEYS' FEES WAS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT.

Under Rule 17 of the Rules of the Supreme Court of the United States, in granting a petition for a writ of certiorari, this court may consider whether a federal court of appeals has decided a federal question in a way which conflicts with applicable decisions of the court.

This court in its decision of F.D. Rich Co. v. United States for the use of

against a

contain a Patent

which complains

decisions of the

Not only is

Rich Co. v. United States

-19-

Petition for Writ of Certiorari

<u>Industrial Lumber</u>, 417 U.S. 116, 40 L.Ed.2d 703 (1974), ruled as follows:

> "The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby are matters of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees. Many federal contracts involve construction in more than one State, and often, as here, the parties to Miller Act litigation have little or no contact, other than the contract itself, with the State in which

> the federal project is located.
> The reasonable expectations of
> such potential litigants are
> better served by a rule of uniform
> national application.

Id. at 127.

The trial court concluded that the scope of the Miller Act with regard to attorneys' fees was a question of federal law consistent with the Rich decision. The Court of Appeals, however, applied the law of the State of California in concluding that the order of the trial court should be reversed.

This court noted in the Rich case that "[a] uniform rule ... avoids many of the pitfalls which have already manifested themselves in using state law referents." Id. In this case, the

Court of Appeals in applying and construing state law in determining the scope of the Miller Act remedy has returned the state of the law on this issue to a rule of nonuniformity.

The Court of Appeals attempted to avoid the Rich decision by construing the contract between the parties as one providing for attorneys' fees. However the only reference to attorneys' fees in the entire agreement is contained in Article 9 entitled "Default." Paragraph 9.2 of Article 9 provides that upon default and termination of the subcontractor from the project,

> "...the contractor may take possession of the plant and work, materials, tools, appliances and equipment of the subcontractor at the building site, and through

> himself or others provide labor, equipment and materials to prosecute subcontractor's Work on such terms and conditions as shall be necessary, and shall deduct the cost thereof, including without restriction thereto all charges, expenses, losses, costs, damages, and attorney's fees, incurred as a result of the subcontractor's failure to perform, from any money then due or thereafter to become due to the subcontractor under this agreement."

The appellate court concluded the foregoing provision was sufficient to trigger the operation of California Civil Code Section 1717, which is a California statute enacted to transform a unilateral contract right to

attorney's fees into a reciprocal provision designed to accomplish a mutuality of remedy. Nasser v. Superior Court, 156 Cal.App.3d 52 (1984).

The California Supreme Court "has determined that one may only recover attorneys' fees pursuant to Section 1717 if 'one would have been liable' for such fees had the opposing party prevailed." Leach v. Home Savings & Loan Association, 185 Cal.App.3d 1295, 1306-1307 (1986). the opinion of the Court of Appeals never considered the issue of whether ESTO would have been entitled to recover attorneys' fees had it prevailed in the action. Had the issue been addressed, it would be clear that ESTO could not have recovered attorneys' fees in the trial court.

It is submitted that the Court of

Appeals erred in referring to state law to determine the scope of the Miller Act, and further erred in construing the state law in a manner which allowed it to read into the contract a provision for attorneys' fees which would have otherwise been absent.

II

THE RULING OF THE COURT OF APPEALS WITH REGARD TO THE JURY INSTRUCTIONS HAS RESULTED IN A CONFLICT OF DECISIONS BETWEEN TWO CIRCUITS.

Rule 17.1(a) of the Rules of the Untied States Supreme Court allows this court to consider a conflict in the decisions of two courts of appeals in determining whether to review a matter on a writ of certiorari.

In its decision in this case, the

appellate court held that the failure of trial counsel to object to the failure to give four offered jury instructions, after the trial court had already ruled on the matter, resulted in a waiver of the right to raise the issue on appeal. The opinion was based on Rule 51 of the Federal Rules of Civil Procedure,which provides that: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict stating distinctly the matter objected to and the grounds of the objection".

In another opinion of the Court of Appeals, it has been specifically held that the filing and obtaining of a ruling on a proposed jury instruction satisfies the requirements of Rule 51.

In Bowley v. Stotler & Co., 751 F.2d 641 (3rd Cir. 1985), the defendants contended that the plaintiff failed to make a timely objection to a proposed jury instruction because the objection was not called to the trial court's attention . The court stated:

> "In this circuit it is clear that by filing and obtaining a ruling on a proposed instruction a litigant has satisfied Rule 51.
>
> We have held that Rule 51 'is designed to preclude counsel from assigning for error on appeal matters at trial which he did not fairly and timely call to the attention of the trial court.' [citations omitted.] But it is likewise true that 'there is no good reason for applying the rule

> so indiscriminately so as to prevent counsel from pointing out on appeal matters which he did endeavor to identify to the trial court in which he had every reason to believe the court fully comprehended when granting an exception.'"

Id. at 646-647.

Given the record, it simply would have been a waste of the trial court's time and attention to make an objection to a jury instruction which was considered and rejected by the trial court. The reliance on Rule 51 in the opinion simply elevates form over substance. The Bowley decision should control the effect of Rule 51 with regard to the offering of jury instructions.

III.

CONCLUSION.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

DONALD B. DEVIRIAN,
Attorney for Petitioners.

APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES FOR USE AND
BENEFIT OF DENNIE REED, dba
Dennie Reed & Sons, Inc.,
Plaintiff-Appellee,

v.

C.E. CALLAHAN, dba C.E. Callahan
Co.,
Defendant-Cross-claimant-Appellee,

v.

ESTO, INC., formerly known as
H.A. Ekelin & Assoc.; UNITED
PACIFIC INSURANCE COMPANY;
RELIANCE INSURANCE CO.,
Defendants-Cross-claimants-Appellants.

No. 86-5965
D.C. No.
CV-83-0197-AWT

UNITED STATES FOR USE AND
BENEFIT OF DENNIE REED, dba
Dennie Reed & Sons, Inc.,
Plaintiff-Appellee,

v.

C.E. CALLAHAN, dba C.E. Callahan
Co.,
Defendant-Cross-claimant-Appellant,

v.

ESTO, INC., formerly known as
H.A. Ekelin & Assoc.; UNITED
PACIFIC INSURANCE COMPANY;
RELIANCE INSURANCE CO.,
Defendants-Cross-claimants-Appellees.

No. 86-5968
D.C. No.
CV-83-0197-AWT
OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
June 5, 1989—Pasadena, California

Filed September 6, 1989

Before: Procter Hug, Jr., Cynthia Holcomb Hall and
Charles Wiggins, Circuit Judges.

Opinion by Judge Hug

SUMMARY

Attorneys' Fees/Courts and Procedure

The court affirmed in part and reversed in part, remanding for further proceedings. The court held that disputes as to factual matters precluded granting of a judgment notwithstanding verdict and that application of a state law warranted granting of attorneys' fees in a matter grounded in federal law.

Appellant H.A. Ekelin was prime contractor for a military construction project. Ekelin hired appellee C.E. Callahan for subcontracting work and later terminated his services. Another party brought a Miller Act (40 U.S.C. § 270) claim against Callahan and Ekelin, and Callahan cross-claimed under the Miller Act and various California law provisions against Ekelin. Callahan prevailed in a jury trial and was awarded damages based on both federal and state law claims. Callahan applied for attorneys' fees, basing his claim on a provision in the contract providing attorneys' fees to the contractor and relying on a California reciprocity rule under which attorneys' fees may be awarded to the prevailing party if a contract provides for fees for one of the parties. The trial court granted attorneys' fees only for the portion of damages apportionable to the state-law claims. The trial court denied Ekelin's motions for a directed verdict and for judgment notwithstanding the verdict (JNOV). On appeal, Callahan challenged the decision to limit fees to state-law based claims, and Ekelin challenged denial of the JNOV motion.

[1] Ekelin's challenge to the verdict was based on the fact that Callahan's case consisted primarily of his own testimony. [2] The court determined that the jury was entitled to weigh Callahan's testimony against Ekelin's documents and conclude in Callahan's favor. [3] The court also rejected an argument that accord and satisfaction should have barred

recovery, observing that [4] the parties made the issue of releases and economic duress a prominent part of their cases and that the jury's findings were supported by substantial evidence.

[5] Ordinarily, questions involving attorneys' fees are reviewed for abuse of discretion, but the present case involved an application of law to the fees request. [6] *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116 (1974) was relied upon by the trial court for the proposition that a restrictive federal rule should govern award of fees in the present context. [7] In that case, however, unlike the present situation, there was no provision for fees in the construction contract. [8] The task for the court, then, was simply to construe the contract according to applicable law, which holds that state law controls the interpretation of Miller Act subcontracts to which the United States is not a party. Thus, the contract was properly interpreted according to California law. [9] Callahan's interpretation of the California statute was correct: the reciprocity rule converts a one-way fees clause into a reciprocal fees provision. [10] Ekelin's argument relied on an older case which was no longer controlling, since the California legislature has recently amended the statute to provide that a provision for attorneys' fees applies to the entire contract.

COUNSEL

Donald B. Devirian, Brown & Brown, Los Angeles, California, for H.A. Ekelin & Associates, United Pacific Insurance Company, and Reliance Insurance Company, the defendants-cross-claimants-appellants.

Herbert F. Blanck, Blanck & Blanck, Camarillo, California, for C.E. Callahan, the defendant-cross-claimant-appellee.

OPINION

HUG, Circuit Judge:

This case presents two appeals arising out of a district court action brought under the Miller Act, 40 U.S.C. §§ 270a-d (1982), in which Callahan recovered a judgment for damages and attorneys' fees against H.A. Ekelin and Associates ("Ekelin"). In No. 86-5965, Ekelin appeals the denial of its motion for judgment notwithstanding the verdict ("JNOV"). Ekelin also challenges the trial court's refusal to give certain proposed jury instructions.[1] In No. 86-5968, Callahan appeals the district court's decision to limit attorneys' fees to the pendent state law portion of his Miller Act suit against Ekelin. We affirm the district court's rulings on the JNOV motion and jury instructions. We reverse and remand the attorneys' fees decision because we conclude that Callahan is entitled to fees for his entire case.

I.

This dispute grew out of the construction of several buildings at Ft. Irwin, California. The Department of the Army retained Ekelin as prime contractor for the project. United Pacific Insurance Company and Reliance Insurance Company issued the contractor's bond required under the Miller Act. 40 U.S.C. § 270a (1982). Ekelin hired Callahan as a subcontractor to grade the building sites and place concrete aprons around each building.

Ekelin and Callahan did not enjoy the most harmonious of working relationships. Hired in March, 1982, Callahan left the job site eight months later after Ekelin terminated his services. The parties exchanged a number of accusations. Each insisted that the other failed to perform as required by the

---

[1] In the course of this suit, Ekelin changed its name to Esto, Inc. We will refer to Ekelin by its original name throughout this opinion.

subcontract, thereby generating delays and errors, and ultimately causing a breach of the agreement. Ekelin asserted that Callahan's poor work performance forced it to complete some projects and rework others at its own expense. Callahan contended that Ekelin's mismanagement left him bankrupt, in debt, and partially uncompensated for work performed.[2]

This action began when Dennie Reed, a sub-subcontractor, named Callahan along with Ekelin and the sureties in a Miller Act suit. Callahan cross-claimed under the Miller Act and various state law provisions against Ekelin and the sureties. After some pretrial activity, Reed settled his case with Ekelin and dropped out of the suit. Callahan's cross-claims then went before a jury, which found for Callahan and awarded him $266,001.50 in total damages against all the defendants. Of that award, $69,222.50 consisted of state law delay damages levied against Ekelin alone.

Following the jury verdict, Callahan applied for attorneys' fees for his cross-claims. He based his fees argument on paragraph 9.2 of the contract he signed with Ekelin. This section reads in relevant part:

> [In the event of breach or default by the subcontractor] the Contractor may . . . through himself or others provide labor, equipment and materials to prosecute Subcontractor's work on such terms and conditions as shall be deemed necessary, and shall deduct the cost thereof, including without restriction thereto all charges, expenses, losses, costs, damages, and attorney's fees incurred as a result of the Subcontractor's failure to perform . . . .

Although this paragraph applies on its face only to the collec-

---

[2] Callahan filed for bankruptcy under Chapter 11 in 1983. In 1985, about five months before trial of the Miller Act case, the bankruptcy court converted the Chapter 11 filing to Chapter 7.

tion of fees by the contractor against the subcontractor, Callahan contended that California's reciprocity rule for attorneys' fees, Cal. Civil Code § 1717 (West 1985 & Supp. 1989), made fees available to him.[3]

The trial judge agreed that fees were due, but only to the extent that the total damages award rested on state law. He reasoned that the Supreme Court's decision in *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116 (1974), required application of federal common law to attorneys' fees claims in Miller Act cases. Since the contract provided fees only to the contractor and because section 1717 of the California Civil Code is not part of the federal common law, the trial court concluded that fees could not be ordered under federal law for the Miller Act portion of Callahan's case. The trial judge held, however, that fees were available under state law for Callahan's delay damages award. Since the damages for delay constituted about 26% of the total, he approved only 26% of Callahan's total fees request.

While Callahan pursued his fees claim, Ekelin sought to overturn the jury's verdict. At the close of plaintiff's case, Ekelin had moved for a directed verdict. The trial judge granted the motion with respect to several claims raised by Callahan involving negligence, bad faith, and delay damages under the Miller Act. He denied the motion for the remaining Miller Act and damages claims. After the jury rendered its

---

[3] Section 1717 states in relevant part:

> [I]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party pre-vailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.
>
> Where a contract provides for attorney's fees, . . . that provision shall be construed as applying to the entire contract . . . .

decision, Ekelin moved for a JNOV or, in the alternative, for a new trial. Ekelin argued that the evidence introduced at trial was insufficient to sustain the verdict. Ekelin also asserted that the court erred by refusing to give certain jury instructions proffered by Ekelin. After consideration of the parties' arguments on these points, the district judge rejected the JNOV motion.

Ekelin challenges the denial of the JNOV motion and reasserts the jury instruction claim. Callahan appeals the decision to limit the award of attorneys' fees to only 26% of his case. Our jurisdiction comes under 28 U.S.C. § 1291 (1982). We consider each argument in turn.[4]

II.

We test the denial of a JNOV under the same standard used to review a jury verdict. *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370-71 (9th Cir. 1987). A JNOV is properly denied when the verdict is supported by substantial evidence. *Id.* at 1371; *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir. 1987). If reasonable minds could differ over the verdict, a JNOV is inappropriate. *Venegas*, 831 F.2d at 1517; *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir.

---

[4] As a preliminary matter, Ekelin raises for the first time a question about Callahan's position as the real party in interest. All suits in federal court must be brought in the name of the real party in interest. Fed. R. Civ. P. 17. Ekelin contends that the conversion of Callahan's Chapter 11 petition to a Chapter 7 proceeding, see note 2, *supra*, left only the Chapter 7 trustee with the right to sue as the real party. We do not decide that question because we find that Ekelin waived this objection by failing to raise it in a timely manner. *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir. 1982); *Chicago and Northwestern Transp. Co. v. Negus-Sweenie, Inc.*, 549 F.2d 47, 50 (8th Cir. 1977) (real party objection should be voiced during trial court proceedings). Ekelin states that it waited until now to raise the issue because it relied upon representations by Callahan's counsel that the real party problem had been corrected. Assuming such a representation was made, Ekelin chose to depend on it at its own risk. We will not upset the jury verdict and judgment on the basis of this belated argument.

1985), *cert. denied*, 475 U.S. 1122 (1986). We review the evidence in the light most favorable to the non-moving party, and draw all inferences in that party's favor. *Venegas*, 831 F.2d at 1517; *Peterson*, 771 F.2d at 1252.

[1] Ekelin raises a battery of claims challenging the verdict. It insists that the evidence it introduced in the form of progress payment records, daily reports, change orders, billing statements and other documentary materials, lead to a single inexorable conclusion: Callahan was not entitled to damages or compensation of any sort beyond the fees he actually received. Ekelin returns repeatedly to the observation that Callahan's case consisted primarily of his own testimony, supported on occasion by other witnesses, while Ekelin's defense drew heavily on written sources. It maintains that its records should trump Callahan's words.

In essence Ekelin argues that the jury believed the wrong evidence: it should have accepted Ekelin's documents rather than Callahan's oral testimony. This claim, as the Fifth Circuit remarked in another Miller Act suit, is "an all too familiar but altogether inappropriate appellate argument." *United States ex rel. Micro-King Co. v. Community Science Technology, Inc.*, 574 F.2d 1292, 1295 (5th Cir. 1978). It is the jury's function to "weigh[] the contradictory evidence and inferences, judge[] the credibility of witnesses, . . . and draw[] the ultimate conclusion as to the facts." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). We are satisfied that the evidence was sufficient to support the verdict. ⑤

[2] As another ground for reversing the denial of the JNOV, Ekelin contends that accord and satisfaction should have barred as a matter of law any recovery by Callahan. Ekelin bases this argument on Callahan's signing of various releases and change orders that purported to settle all claims related to work performed by Callahan up to the time of signing.

[3] Assuming that accord and satisfaction were properly raised as an affirmative defense, a matter which Callahan con-

tests, we conclude that the issue became a factual dispute between the parties that the jury resolved in Callahan's favor. Under California law, economic duress can serve as a basis for invalidating a release or waiver. *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 204 Cal. Rptr. 86 (Cal. Ct. App. 1984). This doctrine applies when the releasee commits a wrongful act sufficiently coercive to compel the releasor to sign the release or face financial ruin. *Id.* at 89. *See also Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 469 (9th Cir. 1987).

[4] The parties made the issue of the releases and economic duress a prominent part of their cases. They addressed it in their opening and closing arguments, elicited witnesses' testimony in relation to it, argued it in Ekelin's directed verdict motion, and agreed to a jury instruction covering it. We conclude that Callahan put on enough evidence about his economic situation and Ekelin's behavior to survive a directed verdict and to support a finding of economic duress. Consequently, Ekelin was not entitled to a JNOV based on accord and satisfaction.

III.

Ekelin, in its last argument, challenges the district judge's decision not to give four proposed instructions to the jury. Fed. R. Civ. P. 51 provides that "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

Our review of the record reveals that both parties offered instructions and the judge went through those offered instructions, hearing objections and stating his reasons why he intended to give or not to give the instructions. Although Ekelin's counsel offered the four proposed instructions and heard the reasons why the judge declined to give them, no objection was made to the failure to give them in compliance

with Rule 51. The objections were made for the first time in the motion for new trial. We have recognized one exception to the requirement of strict compliance with Rule 51. That exception is when it is obvious that in the process of settling the jury instructions the court was made fully aware of the objections of the party and the reasons therefor and further objection would be unavailing. In that limited circumstance, we have not required the pointless formality of a specific objection. *See Brett v. Hotel, Motel, Restaurant, Const. Camp Employees and Bartenders Union, Local 879,* 828 F.2d 1409, 1414 n.7 (9th Cir. 1987). The record in this case does not justify the application of that exception. Ekelin has failed to preserve the issue of the rejected jury instructions.

IV.

[5] We next turn to Callahan's contention that he should have been awarded the full request for attorneys' fees. While attorneys' fees awards are generally reviewed for abuse of discretion, *Mitchell v. Keith,* 752 F.2d 385, 392 (9th Cir.), *cert. denied,* 472 U.S. 1028 (1985), we confront here a question involving the district court's application of law to the fees request. Whether the trial court applied the correct legal standard is an issue of law properly reviewed *de novo. See Southerland v. International Longshoremen's and Warehousemen's Union, Local 8,* 845 F.2d 796, 799 n.3 (9th Cir. 1987); *cf. Perry v. O'Donnell,* 759 F.2d 702, 704 (9th Cir. 1985) (district court interpretation of judicial exception to attorneys' fees law reviewed *de novo*).

[6] As the district court recognized, the Supreme Court's decision in *F.D. Rich* serves as the starting point for consideration of attorneys' fees in Miller Act cases. In *F.D. Rich,* the Court confronted a decision by this circuit which authorized fees in a Miller Act bond suit on the basis of the forum state's "public policy." *F.D. Rich,* 417 U.S. at 126. The Court reversed, holding that federal, not state, law should govern the award of fees in this context. *Id.* at 127. Under federal law,

the so-called American Rule of fees applies. Fees are available only when authorized by statute or an enforceable contract or, in the absence of either of these sources, when the losing party has acted in bad faith or the successful party has conferred a substantial benefit on a class of individuals. *Id.* at 126, 129-30; *United States ex rel. Youngstown Welding and Eng'g Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1166 (9th Cir. 1986). The Court noted that the Miller Act itself does not provide for fees. *F.D. Rich*, 417 U.S. at 126.

[7] Callahan presents an issue not directly addressed by *F.D. Rich*. In that case, the Court dealt with a situation in which there was no provision for attorneys' fees in the construction contract. The Court's holding was limited to the question of whether the prevailing party was entitled to attorneys' fees absent a contractual provision for them. In this case, we deal with a specific fees clause in the Ekelin-Callahan subcontract. We are thus concerned here with the contract exception to the American attorneys' fees rule.

[8] Our task, then, becomes one simply of construing the contract according to the applicable body of law. Our circuit has long held that state law controls the interpretation of Miller Act subcontracts to which the United States is not a party. *United States ex rel. Bldg. Rentals Corp. v. Western Casualty and Sur. Co.*, 498 F.2d 335, 338 n.4 (9th Cir. 1974) (listing Ninth Circuit cases applying state law to these subcontracts).[8] Like a court sitting in diversity, we use the law of the forum state to construe the agreement. The contract here, therefore, should be interpreted according to California state law.

[9] Read through the lens of California law, the contract authorizes the award of a full measure of attorneys' fees to

---

[8] For reasons unrelated to *Rich*, choice of law in this area is a point of some debate among the circuits. *See United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors*, 834 F.2d 1533, 1539 n.2 (10th Cir. 1987).

Callahan. Callahan's interpretation of Cal. Civ. Code § 1717 is correct. That statute's reciprocity rule converts a one-way attorneys' fees clause into a two-way avenue of opportunity. *Lafarge Conseils et Etudes v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 n.15 (9th Cir. 1986); *Reynolds Metals Co. v. Alperson*, 158 Cal. Rptr. 1, 3 (Cal. 1979). It creates a reciprocal fees provision no matter how unilateral the wording of the contract. *Wilson's Heating and Air Conditioning v. Wells Fargo Bank*, 249 Cal. Rptr. 553, 557 (Cal. Ct. App. 1988). In this case, the fact that the subcontract expressly limits the availability of fees to the contractor is of no effect. Section 1717 makes the clause as applicable to Callahan as it is to Ekelin.

Ekelin argues that section 1717 should not apply because the contract provides for fees only in the limited circumstance of indemnification for completion of unfinished work, and not in general actions on the contract. Ekelin relies heavily on a California state appellate opinion, *Meininger v. Larwin-Northern Cal., Inc.*, 135 Cal. Rptr. 1, (Cal. Ct. App. 1976), for this position. In *Meininger*, the appellate court addressed the attorneys' fees implications of an indemnity clause in a subcontract. The clause stated that the subcontractor would indemnify the contractor for all expenses, including attorneys' fees, incurred by the contractor as a result of damage to person or property caused by the subcontractor. *Id.* at 2. Meininger, the subcontractor, sued the contractor on a breach of contract theory entirely unrelated to the indemnity clause. Affirming the trial court's denial of fees, the appellate court read section 1717 to mean that a fees clause must specifically provide for fees in an action on the contract before the section applies. *Id.* It held that the indemnification clause's plain language limited the availability of fees to the narrow context of damage expenses incurred by the contractor. The court concluded that section 1717, consequently, did not come into play.

[10] While *Meininger* lends some support to Ekelin's argument, its central proposition is no longer good law. A few

years after *Meininger*, another California appellate case, *Sciarrotta v. Teaford Const. Co.*, 167 Cal. Rptr. 889 (Cal. Ct. App. 1980), took up *Meininger*'s refrain. In *Sciarrotta*, the court rejected attorneys' fees for a successful plaintiff who had sued to enforce a right under a building contract unrelated to the situations covered by the contract's fees clause. The court relied in part on *Meininger* to reach this conclusion. *Id.* at 892. In 1983, the California legislature amended section 1717 to read, "[w]here a contract provides for attorney's fees . . . *such provision shall be construed as applying to the entire contract*, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." Cal. Civ. Code § 1717(a) (West 1985) (emphasis added). The legislature intended this amendment to counter the restrictive readings of fees clauses in *Sciarrotta* and allied cases. *Boyd v. Oscar Fisher Co.*, 258 Cal. Rptr. 473, 479 (Cal. Ct. App. 1989); 7 B. Witkin, *California Procedure*, Judgment § 152 (3d ed.). The current rule mandates an award of fees in any action relating to a contract no matter how restrictive the language in the attorneys' fees clause, unless the specified conditions exist. *See Boyd*, 258 Cal. Rptr. at 479-80. We find no evidence in the record that suggests the exception to section 1717 should apply. Ekelin's reliance on *Meininger* is misplaced.

In light of these considerations, we reverse the district court's partial fee award. We remand for the trial court to award reasonable attorneys' fees for all of Callahan's case, including fees related to this appeal.

V.

We reverse and remand the attorneys' fee ruling for reconsideration in accordance with this opinion. We affirm all other aspects of the judgment.

AFFIRMED IN PART, REVERSED and REMANDED IN PART.

APPENDIX B.

Statutory Provisions Involved.

Rule 51 of the Federal Rules of Civil Procedure (28 U.S.C. Rule 51).

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before

the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

40 U.S.C. Section 270a.

"Before any contract, exceeding $25,000 in amount, for the construction, alternation, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contact to such person,who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the

officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by

the terms of the contract. - Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a

performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such

period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

40 U.S.C. Section 270b.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a

period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person

did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of

the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

California Civil Code Section 1717(a).

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then

the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to

waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.